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EXAMINER				
FONSECA, JESSIE T				
ART UNIT		PAPER NUMBER		
3633				
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/579,362

**Applicant(s)**

NIEMCZYK, ANDREW

**Examiner**

JESSIE FONSECA

**Art Unit**

3633

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 21 September 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) 10-13, 15, 16 and 18 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-9, 14, 17, 19 and 20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 11 May 2006 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

### **DETAILED ACTION**

Applicant's election without traverse of Group I and Species I in the reply filed on 9/21/09 is acknowledged.

Claims 10-13, 15-16 and 18 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 9/21/09.

Note: claim 18 is withdrawn as being dependent upon non-elected claim 16.

Claims 1-9, 14, 17 and 19-20 are to be examined.

### ***Drawings***

The drawings are objected to because it appears reference numeral "24" found fig. 8 should be --124-- as the figure is directed a modified plate member .

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for

consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

### ***Claim Objections***

Claims 4, 14 and 19 are objected to because of the following informalities:

Regarding claim 4 (line 14): The limitation "upper portion of basement wall" appears to be incomplete. Examiner suggests inserting --said-- prior to "basement wall".

Regarding claim 4 (line 7), claim 14 (line 6), and claim 19 (line 6): The limitation "the ground" lacks sufficient antecedent basis.

Regarding claim 17 (line 4): The limitation "upper portion of basement wall" appears to be incomplete. Examiner suggests inserting --a-- prior to "basement wall".

Appropriate correction is required.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-9, 17 and 20 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

With regard to claims 1, 4, 9 and 17: Each claim is directed solely to a basement wall water protection system comprising a water impermeable flexible member. Accordingly, it's improper to recite the long/lower leg section distance of the water impermeable member in terms of an element not positively claimed such as a basement wall.

With regard to claim 8: It's unclear as to how a plurality of corner members is positioned at a corner of two basement walls. It appears applicant is referring to singular corner member positioned at a corner of two basement walls as shown in figure 2?

With regard to claim 20: The limitation "said upper leg" in line 3 of the claim lacks sufficient antecedent basis. It's unclear as to which leg the upper leg is referring to, it appears the upper leg is equivalent to the short leg section found in independent claim 4? Note claim 5 includes similar claimed subject matter.

Claims 1-9, 17 and 20 are examined as best understood.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 4-5, 7-9, 14, 17 and 19-20 are rejected under 35 U.S.C. 102(b) as being anticipated by Rose (US 5,248,225).

With regard to claim 1: Rose discloses a water protection system (figs. 3-5) capable of use in with a basement wall characterized by:

at least one water impermeable flexible member having a short leg section (A) and a long leg section (B) (figs. 3-5; col. 5, lines 17-22).

The short leg section of Rose is capable of being abutted against an upper portion of basement wall so that the long leg section extends substantially away from the basement wall a distance at least as great as the tangent of 15° times the height of the basement wall below the water impermeable flexible member.

Note a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

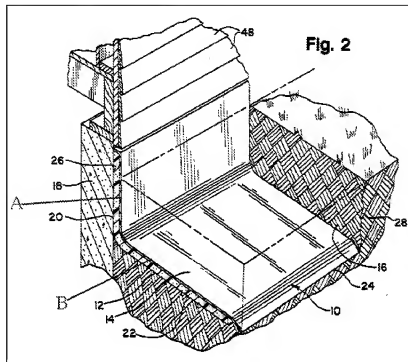


Fig. 2: Rose (US 5,248,225)

With regard to claim 4: Rose discloses a basement wall water protection system characterized by:

a plurality of semi-flexible water impermeable overlapping plate members (14); each plate member having a short leg section (A) and a long leg section (B); and

each of said plate members (14) having a first side edge and a second complementary side edge such that a first side edge of one plate member can join with said second side edge of a second plate member (14) to form a watertight joint (fig. 5; col. 6, lines 49-52).

The short leg section of Rose is capable of being abutted against an upper portion of basement wall so that the long leg section extends substantially away from

the basement wall a distance at least as great as the tangent of 15° times the height of the basement wall below the water impermeable flexible plate member member.

Note a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

With regard to claim 5: The short leg (A) of Rose is capable being placed below ground level and free to move against said basement wall and held against said wall solely by ground pressure.

Note a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

With regard to claim 7: Each of the plate members (14) of Rose is capable of being positioned about 16 inches below ground level with the short leg member abutable against said basement wall.

Note a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.



With regard to claim 8: Rose further discloses a corner member (10c) positioned at a corner of two basement walls and overlapping respective plate members, abutting said respective basement walls (col. 6, lines 53-62).

With regard to claim 9: Rose further discloses the long leg extending away from the foundation at approximately at a downward slope of 1 inch per 12 inch away from the foundation (col. 5, lines 32 -35), which Examiner submits is approximately a 5° slope. Given the slope disclosed by Rose, the angled sloped can be calculated as shown below.

$$\text{Tan (angle)} = (\text{opposite/adjacent})$$

$$\text{angle} = (\tan^{-1}) (1/12)$$

$$\text{angle} = 4.76^\circ$$

As previously noted, the claims are directed solely to the water impermeable member, elements directed to the basement/foundation have not been positively claimed.

With regard to claim 14. Rose discloses a basement wall water protection system characterized by:

a plurality of water impermeable semi-flexible plate members (14);

each plate member (14) having an upper leg section (B) and a lower leg section (A)

each of said plate member (14) having a first side edge and a second complementary side edge such that a first side edge of one impermeable member can

be connected with said second side edge of a second plate member (14) to form a watertight joint (fig. 5; col. 6, lines 49-52).

The upper leg section of Rose is capable of being abutted against an upper portion of a basement wall and the lower leg section of Rose is capable of keeping water away as water seeps downward through the ground toward the basement wall at an angle.

With regard to claim 17: The upper leg section (A) of Rose being short is capable of being abutted against an upper portion of basement wall so that the lower leg section (B) being long extends substantially away from the basement wall a distance at least as great as the tangent of 15° times the height of the basement wall below the water impermeable plate member .

Note a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

With regard to claim 19: Rose discloses a basement wall water protection system characterized by:

a plurality of semi-flexible water impermeable plate members (14);  
each plate member having an upper leg section (A) and a lower leg section (B);  
and

each plate member (14) having a first side edge and a second complementary side edge such that a first side edge of one impermeable member can be connected with said second side edge of a second plate member (14) (fig. 5; col. 6, lines 49-52).

The upper leg section of Rose is capable of abutting against an upper portion of a basement wall, where the lower leg section is capable extending substantially away from said basement wall a distance sufficient to keep water away as water seeps downward through the ground toward the basement wall at an angle

Note a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

With regard to claim 20: The upper leg (A) of Rose is capable being placed below ground level and free to move against said basement wall and held against said wall solely by ground pressure.

Note a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 3 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rose (US 5,248,225) in view of Harvie et al. (US 6,241,421).

With regard to claim 3: Rose discloses everything previously mentioned including the water impermeable flexible member being made of an elastomeric or thermoplastic material (col. 4, lines 52-55), but fails to disclose the water impermeable flexible member being made from a polyethylene plastic material.

However, Harvie et al. discloses a water impermeable member being made of a polyethylene material (col. 3, lines 55-59; col. 4, lines 14-24).

It would have been obvious to one of ordinary skill in the art at the time of the invention was made to modify the water impermeable material of Rose to be made of polyethylene as taught by in order Harvie et al. in order to provide a member that is strong, durable, and resistant to degradation as a result of water exposure. To substitute the water impermeable material of Rose for another known water impermeable material such as taught would not be expected to yield new or unpredictable results.

With regard to claim 6: Rose discloses everything previously mentioned including the water impermeable members being made of an elastomeric or thermoplastic material (col. 4, lines 52-55), but fails to disclose each of the plate members being made from polyethylene.

However, Harvie et al. discloses a water impermeable member being made of a polyethylene material (col. 3, lines 55-59; col. 4, lines 14-24).

It would have been obvious to one of ordinary skill in the art at the time of the invention was made to modify the water impermeable material of Rose to be made of polyethylene as taught by Harvie et al. in order to provide a member that is strong, durable, and resistant to degradation as a result of moisture exposure. To substitute the water impermeable material of Rose for another known water impermeable material such as taught by Harvie et al. would not be expected to yield new or unpredictable results.

Claims 1-2 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cox et al. (US 6,241,421) in view of Harvie et al. (US 6,241,421).

With regard to claim 1: Cox et al. discloses a wall water protection system (figs. 1-4) capable of use with a basement wall characterized by:

at least one water impermeable member having a short leg section (28, back member) and a long leg section (30, foot member).

The short leg section of Cox et al. is capable of being abutted against an upper portion of basement wall where the long leg section is capable of extending substantially away from said basement wall a distance at least as great as the tangent of 15° times the height of the basement wall below the water impermeable flexible member.

Cox et al. discloses everything previously mentioned, but fails to disclose the water impermeable member is of a flexible material.

However, Harvie et al. discloses a water impermeable member made of a flexible material for drainage (col. 3, lines 55-59; col. 4, lines 14-24).

It would have been obvious to one of ordinary skill in the art at the time of invention was made to modify the water impermeable member of Cox et al. to be made of flexible material as taught by Harvie et al. in order to provide a material capable of adapting to the environment in which it would be installed while providing sufficient rigidity for drainage.

With regard to claim 2: Cox et al. discloses a water impermeable flexible member having a first side edge and a second complementary side edge (figs. 2 & 4). The first side edge of the water impermeable flexible member is capable of snap fitting into a second side edge of a second water impermeable flexible member to form a watertight junction.

Note, the claim is directed to a single impermeable flexible capable of snap fitting into a side edge of second water impermeable member, which Examiner submits does not have to be of the same structure as the first impermeable member.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. The prior art cited is directed to drainage systems for installation within or along a building structure.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JESSIE FONSECA whose telephone number is (571)272-7195. The examiner can normally be reached on M-F 7:30am-4:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Robert Canfield can be reached on (571)272-6840. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/J. F./  
Examiner, Art Unit 3633

/Robert J Canfield/

Supervisory Patent Examiner, Art Unit 3635